IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.328 OF 2001

IN

NOTICE OF MOTION NO.3358 OF 1999

IN

B.C.C.C. SUIT NO.4238 OF 1999

ALONG WITH

CIVIL APPLICATION NO.401 OF 2001

Mayur Kapadia ...Appellant

Versus

Municipal Corporation of Gr.Bombay ...Respondent

.....

Mr.Bharat Joshi for Appellant.

Mr.A.Y.Sakhare, Sr.Counsel with Mr.J.Xavier for Respondent.

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**CORAM: A.M.KHANWILKAR, J.**

**JANUARY 27, 2006.**

**P.C.**

1. Heard Counsel for the parties. Perused the relevant records.

2. In my opinion, there is no reason to depart from the conclusion reached by the Court below that the stand taken on behalf of the Plaintiff that the offending structures referred to in the suit notice including the fourth floor construction was in existence in terms of sanctioned plan of 1958 or that there was no covering of open chowk, as no chowk existed in terms of plan of 1958. That plea has been rightly negatived by the Trial Court relying on the sanctioned plan of 1996. The original file was produced before the Trial Court by the Officer to support the stand taken by the Corporation in Paragraphs 6, 7 & 8 of the reply to the Notice of Motion. It is obvious that application for permission of construction of 4th floor was made to the Corporation as per the sanctioned plan of 1996. From the assertions made in Para 8 of the reply affidavit, it is observed that full commencement certificate was issued for repairs to existing building comprising of ground plus two upper floor plus third floor (part) on 27th August 1996. The question of existence of 4th floor before issuance

of commencement certificate will not arise. It is also seen that when the construction on the 4th floor was in progress, notice under Section 354 of the Act to stop work was issued by the Corporation on 29th November 1997. This presupposes that six rooms on the 4th floor were not in existence.

3. Strong reliance was placed on the alleged sanctioned plan of 1958. However, from the reply affidavit as filed by the Corporation, in particular, Paras 6 and 7, it is amply clear that the so-called sanctioned plan produced by the Plaintiff was doubtful. On the other hand, the Plaintiff under his signature had submitted application for permission to construct 4th floor and to carry out repairs in 1996 as has been rightly found by the lower Court.

4. To get over this position, Counsel for the Appellant submits that the signature appearing on the plan produced before the Trial Court which came from the custody of the officials of the Corporation, was doubtful. The Plaintiff was denying his signature on the said document. The

question whether the signature as appearing on the said plan was put by the Plaintiff or not will have to be established at the trial. For the purpose of recording prima facie opinion, I see no reason to depart from the view taken by the lower Court that the signature appearing on the plan produced from the custody of the Corporation was that of the Plaintiff. Counsel for the Appellant, however, placed reliance on the document at page 150 of the paper-book. According to the learned Counsel, the Application was made by the NOC holder Shri Yashwant Kundanlal Shah and Others through their Architect Shri S.J.Khandeparkar and the Plaintiff has no concern with the said application. Indeed, the document would show that the Application dated 1st February 1996 was made by Shri Yashwant Kundanalal Shah and Others through Architect Shri S.J.Khandeparkar but the plan which was accompanying the application was presented under the signature of the Appellant. The signature appearing on the plan is Kapadia Mayur. The said writing corresponds with the admitted signature of the Appellant which was taken into account by the Trial Court. On this finding, the stand of the

Appellant that fourth floor structure existed in terms of sanctioned plan of 1958 or for that matter, there was no covered area as per the said

plan, will have to be negatived, as has been rightly done by the lower Court.

5. Counsel for the Appellant relied on the terms of Consent Terms dated October 25, 1960 to contend that this document makes reference to the agreed arrangement between the parties of constructing the fourth floor within specified time of three months from the date of Consent Terms. It should therefore be assumed, contends learned Counsel for the Appellant that the existence of the fourth floor before the datum line is not in question. This submission clearly overlooks that a hope was expressed in this Consent Terms of constructing the fourth floor within the specified time. That, however, does not mean that the structure was factually constructed before the datum line i.e. 1st April 1962. There is no other documentary evidence produced on record to

substantiate the existence of the offending structure prior to the datum line. No reliable authorisation to construct the fourth floor is forthcoming. I see no reason to depart from the conclusion reached by the lower Court in this behalf. In that sense, no prima facie case was made out by the Appellant for grant of temporary injunction as prayed. It should necessarily follow that this Appeal should fail.

6. There is intriguing feature which is noticed in this matter. The Appeal from Order is filed against order dated 28th March 2001. Ad-interim relief was granted on 30th April 2001 and the matter lastly appeared on Board on 12th July 2001. There is no reason forthcoming as to why the matter did not appear thereafter. It is seen that even the original papers of the proceedings are not traceable in the office, for which reason, the paper book was reconstructed and placed for appropriate orders today by the Registry in terms of order dated January 19, 2006.

7. Suffice it to observe that as no case on

merits is made out, the Appeal should fail. The same is dismissed.

8. At this stage, Counsel for the Appellant submits that the order of status-quo be continued for a period of four weeks to enable the Appellant to take up the matter in appeal. The case on hand is one of the litigant approaching the Court with false plea. The Trial Court has rejected the case of the Appellant on the reasoning as referred to above. In my opinion, no indulgence need be shown to such litigant. The request to continue the status-quo order is, therefore, rejected.

A.M.KHANWILKAR, J.